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[2] **THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

[3] **JUDGMENT**

[4] **Reportable**

[5]

[6] Case No: 20470/2014

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[8] In the matter between:

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[10] FOUR ARROWS INVESTMENTS 68 (PTY) LTD APPELLANT

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[12] And

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[14] ABIGAIL CONSTRUCTION CC FIRST RESPONDENT

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[16] THE REGISTRAR OF DEEDS, PRETORIA SECOND RESPONDENT

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[18] Neutral citation:*Four Arrows Investments 68 v Abigail Construction* (20470/2014) [2015] ZASCA 121 (17 September 2015)

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[20] Coram: Lewis, Mhlantla, Willis, Saldulker and Swain JJA

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[22] Heard: 8 September 2015

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[24] Delivered: 17 September 2015

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6] **Summary*:*** Whether option had been granted: option for the purchase of a portion of agricultural land without Ministerial consent – prohibited in terms of s 3*(e)* (i) of the Subdivision of Agricultural Land Act 70 of 1970.

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[44] **ORDER**

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[47] **On appeal from:** Gauteng Division of the High Court, Pretoria, (Bam J sitting as court of first instance).

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[49] The appeal is dismissed with costs such costs to include the costs of two counsel.

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[52] **JUDGMENT**

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[54] **Swain JA** (Lewis, Mhlantla, Willis and Saldulker JJA concurring):

[55] The central issue in this appeal is whether a contract concluded between the appellant, Four Arrows Investments 68 (Pty) Ltd (Four Arrows), and the first respondent, Abigail Construction CC (Abigail), conferred upon Four Arrows an option to purchase a demarcated portion of an undivided immovable property, or whether the contract constituted a sale of the property, which was subject to a suspensive condition.

[56] The importance of the distinction for Four Arrows lies in its submission that an option for the sale of a portion of agricultural land, the nature of the immovable property in question, does not fall within the prohibition contained in s 3*(e)*(i) of the Subdivision of Agricultural Land Act 70 of 1970 (the Act). This section provides that 'no portion of agricultural land . . . shall be sold or advertised for sale . . . unless the Minister has consented in writing.' The definition of 'sale' in s 1 of the Act includes a sale subject to a suspensive condition.

[57] Four Arrows unsuccessfully relied upon this submission in seeking an order before the Gauteng Division of the High Court, Pretoria, compelling Abigail to pass transfer of the whole property to it. Transfer was sought in reliance upon additional terms in the contract, which made provision for this eventuality in the event of the sale agreement between Abigail and the liquidators of an insolvent company, from whom the property was to be acquired, not proceeding, or the consent of the Minister of Agriculture (the Minister) to the subdivision of the property not being obtained.

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[58] The court a quo (Bam J) held that the contract constituted a sale subject to a suspensive condition, being the approval of the Minister. In reliance upon the decision of this court in *Geue & another v Van der Lith & another* [2003] ZASCA 118; 2004 (3) SA 333 (SCA), it declared the contract void, as claimed by Abigail in its counter-application. The appeal against this decision is with the leave of this court.

[59] Apart from the clause in the contract purporting to confer an option upon Four Arrows, the remaining clauses all clearly indicate that a sale of the property subject to a suspensive condition was intended by the parties. The contract is headed 'Agreement of sale of immovable property. . . .' Abigail and Four Arrows are respectively defined as 'the seller' and 'the purchaser' and it is provided that '[t]he seller hereby sells to the purchaser who hereby purchases the property, at the price and upon and subject to the terms and conditions herein contained.'

[60] Although it is recorded that Four Arrows has agreed to assist Abigail in financing the payment of Abigail's purchase price for the property in the amount of R4 047 000, it is then recorded that this amount 'constitutes payment of the purchase price due to the seller by the purchaser, payable in advance'. It is common cause that this amount was paid: Abigail was ordered to repay Four Arrows by the court a quo.

[61] In this context, clause 2.7.1 which purports to grant an option to Four Arrows to purchase an undivided half share in the property is incomprehensible. The clause provides as follows:

[62] '. . . [T]his Agreement shall be deemed to be an option to purchase the Property granted by the Seller [Abigail] to the Purchaser [Four Arrows] at the price and upon and subject to the terms and conditions hereof which option shall be exercisable by the Purchaser at any time after the Purchaser and the Seller succeeds in obtaining the required consent to the subdivision of the Property from Portion 175.'

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[63] As its name implies, an option confers upon the option holder a choice whether to enter into the main contract or not. It is clear, however, that no provision is made in the contract for the repayment by Abigail of the purchase price paid in advance, in the event of Four Arrows choosing not to exercise the 'option'. This eventuality was not catered for because the parties clearly envisaged the sale proceeding without any election to purchase the property by Four Arrows, once the consent of the Minister was obtained. The absence of this essential element precludes the creation of an option by the parties. The fact that the parties recorded that the agreement 'shall be deemed to be an option to purchase the property' matters not. Substance rather than form has to be considered to ascertain the true nature of the transaction.[1] Its true nature is that of a sale subject to a suspensive condition, which is prohibited in terms of the Act.

[64] Even if a valid option to purchase had been conferred upon Four Arrows, the outcome would be the same. In *Geue* (para 15) it was stated that:

[65] 'The purpose of the Act is not only to prevent alienation of undivided portions of land. The target zone of the Act is much wider. This is clear, for example, from s 3*(e)*(i), which also prohibits *advertisements* for sale. Since advertisements obviously precede the actual sale or alienation of an undivided portion, it is by no means absurd to infer that the Legislature intended to prohibit any sale of an undivided portion of farmland, whether conditional or not, unless and until the subdivision has actually been approved by the Minister. Courts are not entitled, under the guise of absurdity, to avoid the Legislature's clear intention because they regard particular consequences to be harsh or even unwise. Moreover, once the intention of the Legislature is clearly established, it can be dangerous to speculate as to why the Legislature would have intended a particular result. . . .'

[66] That the Legislature has prohibited the advertisement of a portion of agricultural land for sale in the absence of Ministerial consent, clearly indicates that the object of the legislation was not only to prohibit concluded sale agreements, but

[1] *Roshcon (Pty) Ltd v Anchor Auto Body Builders CC & others* [2014] ZASCA 40; 2014 (4) SA 319 (SCA) para 23 et seq.

also preliminary steps which may be a precursor to the conclusion of a prohibited agreement of sale. In this context the grant of an option would clearly be a precursor to the conclusion of a prohibited agreement of sale, at the election of the option holder.

[67] That an option falls within the ambit of the prohibition contained in the Act becomes clear when its true nature is considered:

[68] 'The essence of an option is that it is binding on the option grantor. It is an offer, in this case to sell property, which cannot be revoked. It is the option holder that has the choice whether to exercise its right.'[2]

[69] In the present context the option grantor purports to be bound to sell a portion of agricultural land without Ministerial consent, on the election of the option holder, contrary to the provisions of the Act. The fact that the option may provide, as in the present case, that the option holder may only exercise the option after the consent of the Minister has been obtained, matters not. In the interim, the option grantor purports to be bound to sell a portion of agricultural land without Ministerial consent, which remains contrary to the provisions of the Act.

[70] Counsel for Four Arrows submitted, however, that if clause 2.7.1 was found to be null and void and unenforceable, the whole contract should not suffer the same fate on the basis that the provisions of this clause were severable from the remainder of the contract. On this basis the entitlement of Four Arrows to receive transfer of the whole property, would be based upon the additional terms referred to above, conferring this right on Four Arrows, in the event of the sale agreement between Abigail and the original owner not proceeding.

[71] The probable intention of the parties as it appears from the contract as a whole, was that the principal purpose of the contract was to enable Four Arrows to

[2] *Du Plessis NO & another v Goldco Motor & Cycle Supplies (Pty) Ltd* [2009] ZASCA 62; 2009 (6) SA 617 (SCA) para 15.

purchase one half of the property. The provisions of the contract which provided for the acquisition of the whole property were clearly subsidiary to this principal purpose.[3] The offending clause consequently results in the entire contract being null and void.

[72] In any event, on the evidence, the agreement of sale between Abigail and its seller did proceed to fruition. Four Arrows accordingly did not prove that it was entitled to obtain transfer of the whole property.

[73] The following order is made:

[74] The appeal is dismissed with costs such costs to include the costs of two counsel.

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[78] **K G B Swain**

[79] **Judge of Appeal**

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[83] Appearances:

[84] For the Appellant: M C Erasmus SC (with him D Prinsloo)

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[3] *Sasfin (Pty) Ltd v Beukes* [1988] ZASCA 94; 1989 (1) SA 1 (A) at 16B and 17D-E.

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[85] Instructed by:

[86] De Bruin Oberholzer Attorneys, Centurion

[87] Symington & De Kok, Bloemfontein

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[89]

[90] For the Respondent: C A Da Silva SC (with him J C Klopper)

[91] Instructed by:

[92] Corrie Nel & Co, Pretoria

[93] Honey & Associates, Bloemfontein